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A

Rahmani Ali Mohamad v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–164–06 OF 2012 (IRN)
AZAHAR MOHAMED, ROHANA YUSUF AND TENGKU MAIMUN JJCA
10 JUNE 2014

C

Evidence — Presumption — Drug trafficking — High Court invoked presumption under s 37(d) of the Dangerous Drugs Act 1952 to hold accused had knowledge of drugs concealed in bags — Whether accused in fact rebutted presumption on balance of probabilities — Whether trial court failed to
D *sufficiently judicially appreciate defence case — Whether evidence of investigating officer supported accused's defence that he has no knowledge of the drugs — Whether investigating officer's slipshod investigation denied accused fair chance of acquittal and occasioned failure/miscarriage of justice — Whether trial court ought to have drawn inference in favour of accused at end of prosecution case*

E

The High Court convicted the appellant, an Iranian national, on a charge of trafficking in 14,654g of methamphetamine and sentenced him to death while acquitting his co-accused ('Ebrahim'), another Iranian national, of the same charge without calling for his defence. According to the prosecution's case,
F customs officers at the arrival hall of the Kuala Lumpur International Airport ('KLIA') on checking bags carried by Ebrahim and the appellant upon their arrival from Teheran, discovered a sealed compartment in two bags ('P19A and P19B'). Narcotics officers later found the compartments to contain the methamphetamine. In his defence, the appellant told the trial court that he,
G Ebrahim and three other Iranians, including one Mirza Sadeghi Mohammad Reza ('Mohd Reza') flew into KLIA from Teheran; that after the appellant took a trolley to collect the baggage from the carousel, Mohd Reza took P19A and P19B, which were allegedly his bags, from the carousel and placed them on the same trolley and as they were nearing the customs checkpoint Mohd Reza said
H he was leaving the building first to get a taxi; that when a customs officer opened P19A and P19B suspecting something amiss the appellant told them the bags were Mohd Reza's and when Mohd Reza called him on his cellphone to ask why they were delayed, the appellant told Mohd Reza to come to the checkpoint but the latter did not do so. The appellant said he even handed his
I cellphone to the customs officer to talk to Mohd Reza but the officer did not do so. It was the appellant's case that he did not know P19A and P19B contained drugs; that the bags were not his and that he did not check them in at Teheran Airport. The High Court invoked the presumption under s 37(d) of the Dangerous Drugs Act 1952 ('DDA') to find the appellant had knowledge of

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the drugs concealed in the bags. In his instant appeal against conviction and sentence, the appellant said the trial court erred in failing to find that he had rebutted the presumption of knowledge on a balance of probabilities.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) On the totality of the evidence and the circumstances of the case, the appellant had rebutted the presumption under s 37(d) of the DDA and he had cast a reasonable doubt on the prosecution's case. The appellant had been consistent from the time of his arrest and throughout the trial that he had no knowledge of the drugs. At most, the appellant was only an innocent carrier (see para 17).

(2) There was insufficient judicial appreciation by the trial court of the defence's case, particularly that part of the evidence of the investigating officer, PW8, which was favourable to the appellant. The trial judge's failure in that regard seriously prejudiced the appellant. From PW8's evidence during the prosecution's case itself it was established that the appellant's defence was not a bare denial, that Mohd Reza was on the same flight as the appellant, that the two bags in question did not contain any personal items belonging to the appellant, that the appellant told PW8 he did not know the two bags contained drugs, that despite telling PW8 that someone was waiting for him outside the airport building PW8 did not take the appellant along to look for that person and did not allow the appellant to answer a number of calls he received on his cellphone at the time (see paras 12 & 14).

(3) The appellant at the earliest possible opportunity had given his defence to PW8 that he had no knowledge of the drugs inside P19A and P19B. A detailed and careful scrutiny of PW8's evidence fit in with the appellant's defence that although he had control and custody of the two bags, he had no knowledge of the drugs (see para 13).

(4) The appellant's right to a fair trial was compromised as a result of PW8's failure to carry out investigations to verify the appellant's version of events. It caused the appellant to lose a chance which was fairly open to him of being acquitted and hence there was occasioned a failure or miscarriage of justice. The appellant could not be penalised for PW8's lack of ingenuity, negligence or inadvertence in carrying out his investigations which left material gaps and many stones unturned. The trial judge ought to have drawn an inference in favour of the appellant at the close of the prosecution's case (see paras 15–16).

[Bahasa Malaysia summary

Mahkamah Tinggi mensabitkan perayu, seorang warganegara Iran, atas pertuduhan mengedar 14,654g methamphetamine dan menjatuhkan

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hukuman mati ke atasnya tetapi melepaskan tertuduh bersama ('Ebrahim'), seorang lagi warganegara Iran, atas pertuduhan yang sama tanpa memanggilnya untuk membela diri. Menurut kes pendakwaan, pegawai-pegawai kastam di balai ketibaan Lapangan Terbang Kuala Lumpur, ketika memeriksa beg-beg yang dibawa oleh Ebrahim dan perayu setibanya mereka dari Tehran, telah menjumpai satu bahagian dalam dua beg ('19A and P19B'). Pegawai-pegawai narkotik kemudian mendapati bahawa bahagian-bahagian tersebut mengandungi methamphetamine. Dalam pembelaannya, perayu memberitahu mahkamah perbicaraan bahawa dia, Ebrahim dan tiga orang lagi warganegara Iran, termasuk seorang yang bernama Mirza Sadeghi Mohammad Reza ('Mohd Reza') telah terbang ke KLIA dari Tehran; bahawa selepas perayu mengambil troli untuk mengambil bagasinya dari karousel dan meletakkannya pada troli yang sama dan oleh kerana mereka sedang mendekati tempat pemeriksaan kastam, Mohd Reza menyatakan bahawa dia akan meninggalkan bangunan terlebih dahulu untuk mendapatkan teksi; bahawa apabila pegawai kastam membuka P19A dan P19B kerana mengesyaki bahawa ada sesuatu yang tidak kena, perayu memberitahu mereka bahawa beg-beg tersebut adalah milik Mohd Reza dan bahawa Mohd Reza menelefon menerusi telefon bimbitnya untuk bertanyakan mengapa mereka lambat, perayu memberitahu Mohd Reza agar datang ke tempat pemeriksaan tetapi Mohd Reza tidak berbuat begitu. Perayu mengatakan bahawa dia telah menyerahkan telefon bimbitnya kepada pegawai kastam untuk bercakap dengan Mohd Reza tetapi pegawai tersebut tidak berbuat sedemikian. Adalah menjadi kes perayu bahawa dia tidak mengetahui P19A dan P19B mengandungi dadah-dadah; bahawa beg-beg tersebut bukan miliknya dan bahawa dia tidak memeriksa keduanya di Lapangan Terbang Tehran. Mahkamah Tinggi membangkitkan anggapan di bawah s 37(d) Akta Dadah Berbahaya 1952 dalam memutuskan bahawa perayu mempunyai pengetahuan tentang dadah-dadah yang disorokkan dalam beg-beg tersebut. Dalam rayuan terhadap sabitan dan hukuman ini, perayu menyatakan bahawa mahkamah perbicaraan khilaf dalam memutuskan bahawa dia telah menyangkal anggapan pengetahuan atas imbangan kebarangkalian.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan melepaskan dan membebaskan tertuduh:

(1) Berdasarkan keseluruhan keterangan dan hal keadaan kes, perayu telah menyangkal anggapan di bawah s 37(d) ADB dan telah membangkitkan keraguan munasabah atas kes pendakwaan. Perayu konsisten dari masa tangkapannya dan sepanjang perbicaraan bahawa dia tiada pengetahuan mengenai dadah tersebut. Paling tidak, perayu cuma seorang pembawa tidak bersalah (lihat perenggan 17).

(2) Tidak terdapat pertimbangan kehakiman yang cukup oleh mahkamah perbicaraan atas kes pembelaan, khasnya bahagian keterangan pegawai penyiasat, PW8 yang berpihak kepada perayu. Kegagalan hakim bicara

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berkenaan itu telah memprejudiskan perayu secara serius. Berdasarkan keterangan PW8 ketika kes pembelaan itu sendiri, telah membuktikan bahawa pembelaan perayu bukanlah penafian semata-mata, bahawa Mohd Reza berada dalam penerbangan yang sama dengan perayu, bahawa kedua-dua beg yang menjadi pertikaian tidak mengandungi apa-apa barangan peribadi milik perayu, bahawa perayu memberitahu PW8 bahawa dia tidak mengetahui kedua-dua beg mengandungi dadah, bahawa walaupun telah memberitahu P8 bahawa seseorang sedang menunggunya di luar bangunan lapangan terbang, PW8 tidak membawa perayu bersama untuk mencari orang tersebut dan tidak membenarkan perayu menjawab beberapa panggilan telefon yang diterima pada telefon bimbitnya pada ketika itu (lihat perenggan 12 & 14).

(3) Perayu, pada peluang awal telah mengemukakan pembelaannya kepada PW8 bahawa dia tidak mempunyai apa-apa pengetahuan tentang dadah dalam P19A dan P19B. Penelitian terperinci dan berhati-hati ke atas keterangan PW8 bertepatan dengan pembelaan perayu bahawa walaupun dia mempunyai jagaan dan kawalan atas kedua-dua beg, dia tidak mempunyai pengetahuan terhadap dadah tersebut (lihat perenggan 13).

(4) Hak perayu untuk perbicaraan yang adil terjejas akibat kegagalan PW8 menjalankan siasatan untuk memastikan versi perayu-perayu mengenai kejadian-kejadian. Ini menyebabkan perayu kehilangan peluang yang mana terbuka kepadanya untuk lepas dan seterusnya menyebabkan kegagalan keadilan. Perayu tidak boleh dihukum atas kekurangan kepintaran, kecuaian atau kelalaian PW8 dalam menjalankan siasatannya yang mana menyebabkan jurang-jurang material dan banyak isu tidak dikupas. Hakim bicara sewajarnya membuat kesimpulan berpihak kepada perayu di akhir kes pendakwaan (lihat perenggan 15–16).]

Notes

For cases on drug trafficking, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2438–2452.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237, HC (refd)
Fadil bin Bachok @ Sanusi v PP [2013] 2 MLJ 391, CA (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28, HC (refd)
Lim Hock Boon v PP [2007] 1 MLJ 46, CA (refd)
Mraz v The Queen (1953) 93 CLR 493 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)

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A *PP v Lin Lian Chen* [1992] 2 MLJ 561, SC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)

Legislation referred to

B Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2)
Penal Code s 34

Appeal from: Criminal Trial No 45A–203 of 2009 (High Court, Shah Alam)

Geethan Ram Vincent (Mohd Norazihan Din with him) (Salehuddin Saidin &
C *Associates) for the appellant.*
Samihah Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

D

[1] In the High Court, the second accused, Rahmani Ali Mohamad ('the appellant') was charged and tried together with the first accused, one Ashrafi Ebrahim Hamdollah ('Ebrahim') for the common intention of trafficking in
E 14,654g of methamphetamine, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA), and punishable with mandatory death penalty prescribed under s 39B(2) of the DDA read with s 34 of the Penal Code. Both the appellant and Ebrahim are Iranian nationals.

F **[2]** The offence was said to have been committed on 6 June 2009 at around 4.15pm at *Kaunter Pemeriksaan Kastam A, Unit Khas Pemeriksaan Penumpang 1*, Arrival Hall of the Main Terminal, Kuala Lumpur International Airport ('KLIA'). It was the case of the prosecution that the appellant and Ebrahim were in physical custody and control of two bags, which were later found to
G contain the impugned drugs.

[3] As it turned out, at the close of the prosecution case, Ebrahim was acquitted of the trafficking charge by the learned High Court judge without his
H defence being called. No appeal has been filed by the prosecution against that decision.

[4] However, the learned High Court judge came to a finding that the prosecution had made out a prima facie case against the appellant and therefore
I called upon him to enter his defence. At the conclusion of the case, the appellant was found guilty by the learned High Court judge. The appellant was convicted of the trafficking charge and was sentenced to death. The appellant then appealed to this court. We heard his appeal and we unanimously allowed it. We now give our reasons.

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[5] The essential prosecution evidence adduced at the trial, which the learned High Court judge held made out a prima facie case against the appellant is as follows. At the material time and place, two customs officers namely, Nor Azlina bt Zainal Abidin ('PW5') and Lim Yii Chan ('PW6') while on duty at the *Bahagian Pemeriksaan Penumpang KLIA* had seen Ebrahim and the appellant heading out from carousal A pulling one bag each. PW5 called Ebrahim and the appellant and asked them to scan their bags. Ebrahim was seen pulling bag P19B while the appellant was seen pulling bag P19A.

[6] Upon conducting a scan, PW5 noticed that there was a green image from both P19A and P19B. PW5 then asked PW6 to conduct a physical examination on P19A and P19B. PW6 instructed Ebrahim to open P19B. At that moment, Ebrahim signaled and pointed to the appellant. PW6 then instructed the appellant to open both the bags. After the bags were opened by the appellant, PW6 noticed that the bags had a 'compartment'. It was at this time, PW5 instructed PW6 to refer the matter to their immediate supervisor, Tiew Hai Kin ('PW7'). PW7 then asked PW5 and PW6 to bring Ebrahim and the appellant together with P19A and P19B to his office. Subsequently PW7 contacted *Cawangan Narkotik Kastam Diraja Malaysia*. The investigating officer, Samsuri bin Ibrahim ('PW8') then arrived at PW7's office. Upon examination, PW7 found both the bags to contain a total of four plastic bags filled with drugs. The drugs were found in sealed compartment in the two bags.

[7] The four plastic bags were later sent to the Chemistry Department for chemical examination and analysis. The chemist, Hjh Shadiah bt Mohamad ('PW1') confirmed that the four plastic bags contained a total of 14,654g of methamphetamine.

[8] On being called to make his defence, the appellant elected to give evidence under oath. The gist of his evidence is well summarised by the learned High Court judge in his judgment as follows:

> Pembelaan OKT2/Perayu datang dari Iran untuk melancong ke Malaysia bersama OKT1 atas tajaan rakan beliau bernama Mohsein. OKT2/Perayu hanya membawa beg galas P30 mengandungi sedikit pakaian sahaja, begitu juga OKT1 membawa beg galas P29.
>
> Urusan daftar masuk di Lapangan Terbang Tehran dilakukan oleh Mohsein, Amir dan Mirza Sadeghi. Apabila tiba di KLIA, 'Mirza Sadeghi' memberitahu bahawa beliau ada membawa dua beg di conveyor belt bagasi. Mirza Sadeghi memberitahu bahawa 2 beg tersebut berisi barang 'cenderahati'. Perjalanan mereka dari Teheran – Shiraz – Dubai – Kuala Lumpur.
>
> OKT2/Perayu telah mengambil trolli apabila tiba di conveyor belt kerana OKT1 menyuruh beliau berbuat demikian untuk meletakkan beg-beg mereka. Apabila Mirza Sadeghi mengambil dua beg beliau dari 'carousel' bagasi, beliau telah

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meletakkan kedua-dua beg ke atas troli yang sama. OKT2/Perayu hanya bantu menolak troli untuk keluar.

Apabila melalui lorong keluar, mereka dipanggil oleh SP5 untuk mengimbas bagasi mereka. Pada masa yang sama Mirza Sadeghi memberitahu beliau keluar dahulu untuk mengambil teksi.

Menurut OKT2/Perayu, ketika itu hanya satu mesin pengimbas yang beroperasi, semua penumpang terpaksa melalui lorong tersebut; sebelum OKT1 dan OKT2/Perayu terdapat penumpang-penumpang lain di hadapan mereka.

Apabila sampai giliran mereka, setelah beg P19A dan P19B diimbas, satu daripadanya dibuka oleh Pegawai Kastam yang bertugas di situ dan bukan oleh OKT2/Perayu, beg itu tidak berkunci. Malah beliau telah memberitahu Pegawai Kastam berkenaan bahawa P19A dan P19B adalah kepunyaan Mirza Sadeghi serta meminta Pegawai Kastam tersebut mencari Mirza Sadeghi. Pada masa yang sama, Mirza Sadeghi ada menelefon OKT2/Perayu bertanya kenapa lama sangat, OKT2/Perayu ada meminta Mirza Sadeghi untuk datang ke kaunter kastam kerana pihak kastam ingin membuka P19A dan P19B, tetapi Mirza Sadeghi tidak datang.

[9] It should be pointed out that the learned High Court judge had invoked s 37(d) of the DDA to find knowledge of the appellant of the drugs concealed in the bags. Before this court, the central ground raised by learned counsel for the appellant was that the learned High Court judge had misdirected himself when he failed to rule that the appellant had successfully rebutted the presumption of knowledge on a balance of probabilities.

[10] In considering whether the appellant had successfully rebutted the presumption of knowledge, the learned High Court judge had to scrutinise the evidence as to what the appellant said contemporaneously with the act or omission and also the surrounding circumstances under which the appellant acted or failed to act (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 and *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705).

[11] Now, it was the appellant's case that he did not know P19A and P19B contained the impugned drugs and that he had never seen the two bags before arriving at KLIA. The appellant maintained that both the bags belonged to Mirza Sadeghi Mohammad Reza ('Mohd Reza'). According to the appellant, P19A and P19B were not checked in by him at Teheran Airport. Upon arrival at KLIA, Mohd Reza had collected P19A and P19B from the carousal and placed them on the scanner before heading out to get a taxi. According to the appellant, he had informed the customs officers at KLIA that the bags belonged to Mohd Reza. In order to appreciate the defence of the appellant, it is necessary to reproduce the material part of his evidence:

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I also told the officer that two bags were not mine. I did not touch the bags. Yes, I was standing side by side with OKT1.

Then, Mohd Reza called us through handphone and asked why we was late. I told him to come back. I told something wrongs with his bags. At this time P19A and 19B had been opened by a lady officer contents in the bags. We told her, it was not ours.

Mohd Reza told me through the phone that he will come. Then, they brought us into a room. There, they told us, they want to break the bags. I told it was not our bags. Then my handphone rang. Then I gave my handphone to the officer to show that the owner of the bag is on the phone and please talk to him. The officer did not talk through the phone. I tried very hard in sign language about Reza went out to get a taxi. I do not know whether the officer understand or not. I told them Mohd Reza's name.

My phone rang about two to three times, two times at the scanner. We asked Mohd Reza to come and Ebrahim also talked to him. Inside the room, I told him to speak to the officer through the handphone.

[12] This then brings into focus the evidence of the investigating officer, PW8. From PW8's evidence, the following was established during the prosecution's case itself:

(a) the defence of the appellant was not a bare denial;

(b) the existence of Mohd Reza cannot be doubted;

(c) PW8 produced the Flight Manifest, exh D56 (see pp 388 and 389 of appeal record *Jld* 4) which proved that Mohd Reza travelled on the same flight as the appellant;

(d) the appellant informed PW8 that he did not know P19A and P19B contained drugs;

(e) when the appellant was with PW8, the appellant received a number of calls on his hand phone;

(f) PW8 did not allow the appellant to answer the calls;

(g) the appellant had informed PW8 in broken English that someone was waiting for him outside;

(h) PW8 went to Gate 6 to look for the person. The appellant was not brought along. PW8 could not find the person; and

(i) P19A and P19B did not contain any personal items belonging to the appellant.

[13] The evidence above makes it patently clear that the defence of the appellant that the two bags belonged to Mohd Reza was not something that was sprung for the first time in the defence case (see *Public Prosecutor v Lin Lian*

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Chen [1992] 2 MLJ 561). From the evidence, it is clear that the appellant at the earliest possible opportunity had given his defence to PW8 that he had no knowledge of the drugs concealed inside P19A and P19B. One of the tests for accepting or rejecting the evidence of a witness is how far it fits in with the rest of the evidence and the circumstances of the case (see *Fadil bin Bachok @ Sanusi v Public Prosecutor* [2013] 2 MLJ 391). In our judgment, a detailed and careful scrutiny of the evidence of PW8 fits in with the defence of the appellant that although he had control and custody of the two bags, he had no knowledge of the impugned drugs.

[14] This leads on to the argument of learned counsel that the defence of the appellant had not received any, or any sufficient attention from the learned High Court judge. To undertake a judicial appreciation and maximum evaluation, the learned High Court judge must apply his mind to all the relevant evidence. Nonetheless, a perusal of his judgment shows that the learned High Court judge failed to direct his attention to the defence of the appellant; particularly in the evidence of PW8 that was favourable to the appellant that we have highlighted in para 12 above. There was therefore insufficient judicial appreciation of the defence's case as contended by learned counsel of the appellant. The learned High Court judge had failed to view the defence of the appellant objectively and from all angles. In our judgment, this omission had seriously prejudiced the appellant. This was an error on a very crucial point directly relevant to the defence. The learned High Court judge failed to give judicious consideration to this critical aspect of the defence. In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1).

[15] Even more, no investigation at all was carried out by PW8 to disprove the appellant's version of fact, particularly concerning Mohd Reza, which was given by the appellant at the earliest possible opportunity. In this regard, PW8 said that he did not investigate the appellant's handphone because 'saya terlepas pandang'. PW8 also said, 'saya tak periksa rekod-rekod panggilan keluar masuk OKT 2. Jika disiasat mungkin boleh dapat maklumat lanjut'. The appellant cannot be penalized for lack of ingenuity, negligence or inadvertence on the part of the investigator depriving him of the time honoured benefit of doubt (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137). The manner in which PW8 had conducted his investigations left many stones unturned and material gaps exists. Based on this omission, an inference in the appellant's favour ought therefore to have been drawn by the learned High Court judge at the close of the prosecution case (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209).

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[16] In our judgment, the appellant's right to a fair trial has been compromised as a result of the failure of PW8 to carry out investigation to verify the appellant's version of fact. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see *Mraz v The Queen* (1953) 93 CLR 493 quoted with approval in *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46).

[17] In our judgment, on the totality and prevailing circumstances of the present case, the appellant had rebutted the presumption under s 37(d) of the DDA and that the appellant had cast a reasonable doubt on the prosecution case. The appellant had been consistent from the time of his arrest and throughout the trial that he had no knowledge of the drugs; at most the appellant was only an innocent carrier.

[18] The upshot of all this was that the appellant's conviction was wholly unsafe. This appeal was, therefore, allowed. Accordingly, we quashed and set aside the conviction and sentence against the appellant. He was acquitted and discharged.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar